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DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER 97-0421

SALES AND USE TAX

For Tax Period: 1994 Through 9-30-95

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning specific issues.

ISSUES

1. Sales and Use Tax-Gasoline

Authority: IC 6-2.5-3-2 (a), IC 6-2.5-5-8, *USAir, Inc. v. Indiana Department of State Revenue*, 1989, 542 N.E.2d 1033 (Ind. Tax 1989), aff'd, 582 N.E.2d 777 (Ind. 1981). *Indiana Department of Revenue v. Hertz Corporation,* 457 N.E.2d 246 (Ind. App. 2 Dist. 1983).

Taxpayer protests the imposition of use tax on gasoline purchased for new cars.

2. Sales and Use Tax-Computer

Authority: IC 6-2.5-2-1, IC 6-2.5-1-2, IC 6-2.5-4-1(b), *Blacks Law Dictionary* 161, 350 (5th ed. 1983).

Taxpayer protests the imposition of tax on a computer.

3. Sales and Use Tax-Computer Software

Authority: Information Bulletin Number 8.

Taxpayer protests the imposition of tax on monthly software updates.

4. Sales and Use Tax: Capital Cost Reduction

Authority: 45 IAC 2.2-1-1(j), 45 IAC 2.2-4-7 (d) (1).
Taxpayer protests the imposition of tax on the capitalized cost reduction of vehicle leases.

5. Sales and Use Tax Administration-Negligence Penalty

Authority: IC 6-8.1-10-2

Taxpayer protests the imposition of the negligence penalty.

STATEMENT OF FACTS

Taxpayer is a full service franchised dealer of a major automobile company. Taxpayer sells new and used vehicles, repair parts at retail and wholesale, provides repair and maintenance services in their body shop, rents vehicles for less than thirty days, and leases vehicles for more than thirty days. More facts will be given as necessary.

1. Sales and Use Tax-Gasoline

DISCUSSION

New vehicles arrive at Taxpayer's lot with only one gallon of gasoline. Due to a manufacturer's requirement that all vehicles have a full tank of gas at the time of delivery to the purchaser, Taxpayer fills the gas tanks of all cars prior to sale. The manufacturer gives Taxpayer an allowance to help compensate for the cost of the gasoline. Taxpayer protests the assessment of use tax on the value of the gasoline that Taxpayer puts into vehicles' fuel tanks prior to sale. Taxpayer contends that since the cost of the gasoline reimbursement is figured into the sales price of the vehicle, it actually sells the gasoline to the purchasers in a retail sale. Therefore the gasoline would be exempt from the gross retail tax as a purchase for resale in the ordinary course of business pursuant to IC 6-2.5-5-8. The issue to be determined is if Taxpayer sells the gasoline to the vehicle purchaser in a retail sale or if Taxpayer acquires the gasoline in a retail sale and uses it in Indiana, therefore subjecting it to the imposition of the use tax in IC 6-2.5-3-2(a).

The Indiana Court of Appeals dealt with this issue in *USAir, Inc. v. Indiana Department of State Revenue*, 1989, 542 N.E.2d 1033 (Ind. Tax 1989), aff'd, 582

N.E.2d 777 (Ind. 1981). In that case, the Court considered whether or not the delivery of meals to its passengers is a "resale" so as to statutorily exempt the airline from the payment of use tax taxes on food where the price of the meal was included in price of the ticket. The Court reasoned that there was no separate bargaining or consideration for the meals in the purchase of an airline ticket. Therefore there was no separate retail sale of the meals to the passengers. Since there was no separate retail sale, the sale did not qualify for the purchase for resale exemption. In Taxpayer's situation, there is no separate bargaining or consideration for the fuel put in purchaser's fuel tanks. These purchases of fuel do not qualify for the purchase for resale exemption. Taxpayer actually used the fuel in the furtherance of its business objectives, thus subjecting the use to the gross retail tax.

Indiana Department of Revenue v. Hertz Corporation, 457 N.E.2d 246 (Ind. App 2 Dist. 1983) also deals with this issue. In that case, bulk purchases of fuel by Hertz corporation were held to be exempt because they were purchases for resale. In the Hertz situation, customers had the option of a wet lease, a lease with gasoline, or a dry lease, a lease without gasoline. With a dry lease, customers would be billed a per mile rate and a "refueling" charge based on the amount of fuel required to fill the tank. A wet lease rate was higher per mile than a dry lease rate. Customers had to decide between the two types of leases. The gasoline was clearly an essential element in the bargaining to arrive at the lease contract. The Court ruled that the gasoline in the wet lease situation was entitled to the purchase for resale exemption. Taxpayer's situation is distinguishable from the Hertz case because there is no separate bargaining for the gasoline. Therefore, Taxpayer's purchase of gasoline does not qualify for the resale exemption from the gross retail tax.

FINDING

Taxpayer's first point of protest is denied.

2. Sales and Use Tax-Computer

DISCUSSION

Taxpayer's second point of protests concerns the assessment of gross retail tax on the body shop computer received from Taxpayer's supplier. This computer processes the paint applications and assures that Taxpayer paints cars the appropriately.

IC 6-2.5-2-1 imposes the gross retail tax on retail transactions made in Indiana and states that the person acquiring the property is liable for the tax. A "retail transaction" is defined at IC 6-2.5-1-2 as "a transaction of a retail merchant that constitutes selling at retail". Pursuant to IC 6-2.5-4-1(b), a retail merchant is "Selling at retail" when

> in the ordinary course of his regularly conducted trade or business, he:
> (1)acquires tangible personal property for the purpose of resale, and
> (2)transfers that property to another person for consideration.

Taxpayer contends that the paint supplier gave Taxpayer the computer. Taxpayer contends that since it did not pay for the computer, transfer of the computer was as a gift rather than a taxable retail transaction.

However, the fact that Taxpayer depreciated the cost of the computer on its Federal return evidences that the transfer was a sale. Taxpayer would not be allowed to depreciate the computer if it were a gift. The fact that Taxpayer has a depreciable basis in the computer indicates that it received consideration for the computer.

The transfer of the computer was a retail sale subject to gross retail tax rather than a gift.

Finding

Taxpayer's second point of protest is denied.

3. Sales and Use Tax-Computer Software

DISCUSSION

Taxpayer protests the assessment of tax on the monthly updates for the computer used in painting the cars in the body shop. The monthly update is actually software that the computer uses to keep the body shop apprised of the latest paint colors and how to mix those colors. This is canned software that is provided to all body shops that use a computer like the one in Taxpayer's body shop. Pursuant to Information Bulletin # 8, the purchase of canned software is subject to the gross retail tax.

FINDING

Taxpayer's third point of protest is denied.

4. Sales and Use Tax-Capital Cost Reduction

DISCUSSION

Taxpayer negotiates a lease for a vehicle. In determining the price for the vehicle, the final cost to the purchaser is offset by capital cost reductions. These

capital cost reductions or down payments can be cash tendered, manufacturer's rebates and trade-in allowances. Taxpayer generally collected sales tax on cash down payments and manufacturer's rebates. Taxpayer did not collect sales tax on trade-in allowances. Taxpayer protests the imposition of tax on the value of those trade-in allowances in lease situations after April 25, 1995. On that date, the Indiana Department of Revenue issued an advisory letter to the Automobile Dealer's Association of Indiana, Inc. That letter set out the Department's position that such transactions are subject to tax.

The Department's position, as set out in the April 25, 1995 letter, is based on 45 IAC 2.2-1-1(j), which states that there is a taxable event when any property is used as a medium of exchange in lieu of cash. In Taxpayer's situation, the customer trades property, the used car, in lieu of cash for the lease on the new vehicle. Pursuant to 45 IAC 2.2-4-7 (d) (1), gross retail tax is due on the gross receipts from the rental or leasing of tangible personal property. Therefore, gross retail tax is properly imposed on the total value of the lease.

The Department issued the Advisory letter in April of 1995 and has taken the position that it will not tax trade-in capital cost reductions that occurred before July 1, 1995. This gave dealers ample time to become aware of the Indiana law and departmental interpretation of the law on this complex issue.

FINDING

Taxpayer's protest to the imposition of sales tax on trade-in capital cost reductions prior to July 1, 1995 is sustained. All such transactions on or after July 1, 1995 are subject to tax.

5. Sales and Use Tax Administration-Penalty

DISCUSSION

Taxpayer's final point of protest concerns the negligence penalty that was imposed pursuant to IC. 6-8.1-10-2 (a) which states as follows:

> If a person fails to . . . pay the full amount of tax shown on his return on or before the due date for the return or payment, incurs, upon examination by the department, a deficiency which is due to negligence,. . . the person is subject to a penalty.

In the case of the purchases of gasoline which were used to fill the tanks of newly sold vehicles, Taxpayer relied on previous audits which did not assess additional gross retail tax on those purchases of gasoline. The area of capital cost reductions is extremely complex and the interpretation of the law was in a

state of flux. Therefore, the deficiencies in these areas were not due to negligence.

FINDING

Taxpayer's protest to the imposition of the negligence penalty is sustained.
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